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No. 00-528

IN THE

Supreme Court of the United States

TAYLOR FORGE STAINLESS, INC.
and MICHAEL W. KEARNEY,

Petitioners,

v.

VIACOM INTERNATIONAL INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
PETITIONERS' REPLY BRIEF

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PARTIES TO THE PROCEEDING

The parties to the proceeding and corporate disclosure statement remain the same as set forth in the Petition for a Writ of Certiorari.

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Petitioners, Taylor Forge Stainless, Inc. ("Taylor Forge") and Michael Kearney ("Kearney") respectfully submit this brief in reply to Respondent's, Viacom International Inc. ("Viacom"), opposition to the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Viacom's opposition brief illuminates precisely why this Court needs to address the application of the Supplemental Jurisdiction Statute ("SJ Statute") in diversity jurisdiction situations. On page 5 of Respondent's brief, Viacom presupposes (without citing any precedent) that the SJ Statute overrules the complete diversity requirements of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), the joinder/indispensable party requirements of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) and Shields v. Barrow, 58 U.S. (17 How.) 130 (1854) and this Court's rejection, in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 635 (1978), of manipulation of diversity jurisdiction. Viacom's sole basis for making this supposition is that the Supreme Court cases cited above pre-dated the enactment of the SJ Statute.

Based on this incredible conclusion, which, contrary to Viacom's statement does have "far-reaching implications", Viacom fails to address any of the following issues raised and supported by legal precedent in Petitioners' moving brief:

First, that before the SJ Statute can provide supplemental jurisdiction, a federal court must first have legitimate original diversity jurisdiction (meaning, among

other things, that all indispensable parties have been joined in the original pleading);[1]

Second, that original diversity jurisdiction cannot exist in the event that plaintiff (in this case, Respondent, Viacom) has failed to join an indispensable party as a defendant whose presence would destroy diversity jurisdiction and which had an interest in the outcome of the dispute from its inception. (In addition to cases cited above and in Petitioners' moving brief, see Freeport-McMoran Inc. v. K N Energy, Inc., 498 U.S. 426, 111 S.Ct. 858 (1991) confirming that while the general rule is that diversity is considered at the time an action is initially filed, an exception exists in the event an indispensable party plaintiff or defendant, such as Taylor Forge, is omitted from the original pleading);

Third, that parties are not free to align parties as they desire or as fortuitously occurs because of third or fourth party actions. Parties to an action must be aligned or realigned to correspond to their actual conflicting interests in the case;

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[1] Viacom implies that Petitioners waited too long to bring the motion to dismiss on subject matter jurisdictional grounds. Aside from the fact that subject matter jurisdictional defects are never waived, Viacom's implication is inaccurate. Petitioner, Kearney, did raise the subject matter jurisdictional defect in his **first** dismissal motion, **before** third-party defendant, Conolog, had impleaded Taylor Forge on contribution grounds. However, since Respondent, Viacom, was not given an opportunity to reply to the legal argument, the district court judge ordered a round of full briefing prior to deciding the issue. After that full round of briefing she dismissed the federal action in the opinion which is the subject of this Petition.

Fourth, that the legislative purpose of subsection (b) of the SJ Statute was to prevent, not encourage, the misuse or manipulation of diversity jurisdiction and was never intended to benefit plaintiffs (such as Respondent, Viacom) in obtaining or retaining improper diversity jurisdiction by the expedient of naming only the diverse obligees/obligors to a contract or dispute and waiting for other parties to implead the non-diverse obligees/obligors;[2]

Aside from completely avoiding a discussion of any of these critical legal issues, Respondent, Viacom makes sweeping and unsupported assertions regarding (a) the clarity of the SJ Statute and (b) the nature of the conflict between Viacom and Taylor Forge.

Not only does Viacom groundlessly ignore all diversity jurisdiction related Supreme Court precedent predating the enactment of the SJ Statute, Viacom also disregards Supreme Court precedent post-dating the enactment of the SJ Statute. That precedent, Chicago Int'l Col. of Surgeons, 522 U.S. 156 (1997) and Wisconsin Dept. of Corrections v. Schact, 524 U.S. 381 (1998), makes it quite clear that the SJ Statute did not operate to overrule existing Supreme Court precedent concerning original jurisdictional requirements, nor operate to eviscerate the discretion, inherent in the district courts, to choose to abstain from exercising supplemental

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[2] Although Viacom avers that this matter should be tried in federal district court, Viacom has brought a declaratory judgment action in New Jersey state court seeking to obtain the very same monies from its insurers that it here seeks to obtain from Petitioner, Kearney.

jurisdiction for reasons other than those set forth in the SJ Statute.

Contrary to Viacom's contentions, the application of the SJ Statute is neither straightforward, nor uncomplicated. Were it so, the various Circuit courts would not be interpreting and applying it in such conflicting manners (as discussed in Petitioners' Moving Brief). Moreover, there would not be almost four hundred law review and periodical articles concerning this subject matter, many of which describe the SJ Statute as problematic and confusing, and some of which categorize it as a disaster. As discussed in Petitioners' Moving Brief, the American Law Institute has proposed sweeping changes, and the various authors of the SJ Statute have been and continue to be in a heated, bitter dispute among themselves as to how to interpret and apply the SJ Statute.

Viacom is not asking this Court to endorse a "tolerable" or "narrow" conflict. There is nothing narrow about a conflict which has different Circuits (based on the same statutory language, legislative history and case law) reaching very different conclusions regarding the existence of federal jurisdiction.

Contrary to In re: Abbott Laboratories, Inc., 529 U.S. ____, (2000), which dealt exclusively with jurisdictional amounts in controversy, the within matter squarely presents several vital issues (diversity, joinder, and realignment) which this Court needs to decide in connection with the SJ Statute and diversity jurisdiction.

Also important to this Court's consideration are (a) Viacom's mischaracterization and belittling of the nature

of the dispute among these three parties (Taylor Forge/Kearney/Viacom), and (b) Viacom's evasion of Petitioners' argument that even under the Second Circuit analysis, supplemental jurisdiction should not be exercised because Viacom has asserted direct claims against third-party defendant, Conolog Corporation, which is, itself, a Delaware corporation.

Respondent, Viacom, implies that immediately upon signing the contract in 1984 with Petitioner, Kearney, it began to "implement a cleanup plan on the Taylor Forge premises." Not only is this statement inaccurate (since no cleanup plan, even a conditional one, even existed until 1989), but it downplays the central issue among these three parties. That issue is as follows: Of the 5 million dollars allegedly expended by Viacom at the site over the past 16 years, how much of that (a) was legitimately expended on cleanup implementation work (a concept derived from the New Jersey Environmental Cleanup Responsibility Act) as opposed to sampling and monitoring work, (b) was negligently expended by the first consultants which were replaced after more than 3 million dollars and fourteen years of work and expenditures, and (c) was related to soil, rather than groundwater issues (the latter of which were addressed exclusively in Section 7.7 (ii) of the contract, and for which **Petitioner, Taylor Forge, not Petitioner, Kearney,** has expended hundreds of thousands of dollars for which it is entitled to reimbursement from Viacom).

Viacom cannot seek an interpretation and application of Section 7.7(iii) of the contract, without simultaneously seeking an interpretation and application of Sections 7.7(i) and 7.7(ii). These three sections, when read together, make it clear that Kearney, Taylor Forge

and Viacom are all necessary and indispensable parties to any dispute concerning apportionment of monies spent on environmental work at Taylor Forge's New Jersey property. Indeed, the documents contained in the Joint Appendix filed with the Second Circuit make it clear that during the entire period between 1984 and today (with the sole exception of Viacom's complaint in this federal action) both Kearney and Taylor Forge were parties to all contractually related disputes, agreements, and negotiated resolutions. It is Taylor Forge which owns the contaminated property, pays for groundwater related costs pursuant to Section 7.7(ii) of the contract, and is obligated on the promissory note to Viacom. Petitioner, Kearney, bought Taylor Forge for one dollar.

In a recent stay/abstention hearing, which has yet to be decided, the federal district court judge confirmed that she remained convinced that her dismissal on subject matter jurisdictional grounds was "right and the [Second] Circuit was wrong." Her basis for saying this was that it was all form over substance as to whether Taylor Forge or Viacom asserts the claim against the other. (Stay/Abstention Motion Transcript, Supplemental Lodging Appendix, "Supp. App.", at SL-1, pg. 43, line 25-pg. 44, lines 1-14).[3]

In order to avoid asserting direct claims against Taylor Forge (and thereby automatically destroying jurisdiction) Viacom has taken the approach of forcing Taylor Forge to make the claims and respond by asserting affirmative defenses. However, the claims exist and must

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[3] In other words, Viacom is, in fact, attempting to improperly "'smuggl[e] in claims against non-diverse parties.'" (Respondent's Brief at 8).

be tried, whether asserted by or merely defended by Viacom. See, for example, Case Management Order Number 4 from the parallel New Jersey action, Supp. App. at SL-48. The Order provides that Taylor Forge will refrain from filing an Order to Show Cause forcing Viacom to obtain a permit required for effectuating the cleanup of the Taylor Forge Site due to Viacom's eleventh hour agreement to obtain the permit. That concession by Viacom came after Viacom repeatedly refused to obtain the necessary permit and begrudgingly was made in order to attempt to preserve Viacom's deficient jurisdiction in federal court.

Finally, Viacom's continued attempts to prosecute this federal action amounts to bad faith even in accordance with the ruling of the Second Circuit.

Footnote four of the Second Circuit's opinion makes it clear that Viacom cannot assert what the Second Circuit referred to as "upsloping" claims against Conolog any more than it can assert those claims against Taylor Forge. Although Viacom has not yet responded to Conolog's federal court pleading, it has responded to Conolog's pleading in the parallel reinstated New Jersey Action. As shown by that pleading, a copy of which is included in the Supplemental Lodging Appendix at SL-51, Viacom has asserted numerous upsloping claims against Conolog. These claims, when asserted in federal court, will destroy diversity jurisdiction, even under the Second Circuit's analysis.

If Viacom chooses not to assert these claims in the within federal action (to attempt to circumvent the Second Circuit's decision) then Viacom will have assured piecemeal litigation. This is a result the legislature never

contemplated when enacting the SJ Statute, which was intended to assist in avoiding piecemeal litigation, where appropriate.

Boiled down to its essentials, it becomes apparent that Viacom has been engaged in nothing more than a manipulation of diversity jurisdiction requirements. Neither the legislature, nor this Court has ever countenanced such manipulation and should not do so now.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the moving brief, Petitioners respectfully request that this Honorable Court grant the Petition in its entirety.

Respectfully submitted,

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